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No. 92-1635

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
MYLES E. FLINT
Acting Assistant Attorney General
J. CAROL WILLIAMS
PETER A. APPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred in concluding that the purposes of a ten-year-old consent decree had been accomplished and that the decree accordingly should be terminated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D26) is unpublished, but the judgment is noted at 983 F.2d 1070 (Table). The opinion of the district court (Pet. App. C1-C17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. A petition for rehearing was denied on March 12, 1993. Pet. App. E1-E2. The petition for a writ of certiorari was filed on April 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the termination of a consent decree between the United States Environmental Protection Agency (EPA) and petitioner, the Louisville and Jefferson County Metropolitan Sewer District. The consent decree at issue was entered in 1981 to settle an enforcement action brought by EPA against petitioner[1] under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, to enforce the effluent limitations contained in a permit issued to petitioner for its Morris-Forman Wastewater Treatment Plant (the Plant). Concluding that "the duties of EPA and [petitioner] under the terms of the Consent Decree ended as of November, 1988," Pet. App. 15C-16C, the district court granted EPA's motion to terminate the consent decree. The court of appeals affirmed in an unpublished opinion. Pet. App. D1-D26.

1. The Clean Water Act establishes a permit system for the discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. Two systems govern the issuance of permits. The first is the National Pollutant Discharge Elimination System (NPDES), under which EPA issues permits. 33 U.S.C. 1342(a). The second, and more common, system for issuing permits is through state programs, which, subject to EPA approval, operate in lieu of the federal program. 33 U.S.C. 1342(b) and (c). The statute places certain procedural conditions on the issuance of both state and federal permits. 33 U.S.C. 1342(a)(2) and (b). No permit may last more than five years. 33 U.S.C. 1342(b)(1)(B). Moreover, as a general rule neither a State nor EPA may renew, reissue, or modify permits "to contain effluent limitations which are

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[1] The Commonwealth of Kentucky was originally a defendant in the action, but is now aligned with EPA. The City of Louisville was an intervening plaintiff in the action. See Pet. App. 21D.

less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. 1342(*o*)(1).

States with approved programs are authorized to issue and enforce NPDES permits. 33 U.S.C. 1342(b). EPA may also enforce the provisions of NPDES permits issued by States. 33 U.S.C. 1319(a). States with approved programs are generally expected to undertake primary enforcement responsibility of permits they issue. See *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517, 1519 (9th Cir. 1987).[2]

2. a. This litigation began in 1978 when the United States brought an enforcement action on behalf of the EPA against petitioner, alleging that the Plant was in violation of the effluent limitations set forth in an NPDES permit that had been issued for the Plant in 1977. Pet. App. 3D. See also C.A. App. 16-26 (reprinting permit). Following negotiations, the parties entered into a Memorandum of Understanding. See Pet. App. 4D. The parties subsequently settled the litigation by incorporating the major provisions of the Memorandum of Understanding into the consent decree. On November 24, 1981, the district court entered the decree. C.A. App. 63. Paragraph II of the consent decree stated petitioner's admission that it "ha[d] not attained the effluent limitations" contained in its permit. C.A. App. 50.

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[2] In this case, the Commonwealth of Kentucky (Commonwealth) did not have an approved program when EPA issued petitioner's permit in 1977. EPA subsequently approved the Commonwealth's program. See 48 Fed. Reg. 45,597 (1983). However, EPA retained primary enforcement jurisdiction over permits already approved under the NPDES system. As a result, EPA was primarily responsible for enforcing petitioner's permit for the Plant. Without the consent decree, the Plant would have been required to operate under the Commonwealth's NPDES program because petitioner's permit remained in effect only by virtue of the terms of the consent decree.

Paragraph V(A) of the decree required petitioner to "comply with all conditions and requirements" in its permit, subject to certain exceptions. C.A. App. 51. The consent decree did not address the levels of sewage processed by the Plant.

The consent decree established a program designed to allow petitioner to bring the Plant into compliance with its permit. Appendix A of the decree sets forth that program, and details the interim corrections and the evaluation program for the Plant. The parties structured the interim compliance program "to ascertain if limited improvements can bring about compliance with effluent limitations." C.A. App. 56. "If the actions identified * * * in the Interim Corrective Action and Evaluation Program fail to demonstrate that the [Plant] can achieve compliance with applicable effluent limitations," C.A. App. 61, petitioner would then perform a cost effectiveness analysis of major projects to bring the Plant into compliance. Appendix A also required petitioner to submit a final plan and schedule that would "achiev[e] compliance with all applicable effluent limitations." C.A. App. 62. Under the decree, EPA approval was required before petitioner could implement the final plan and schedule. *Ibid.*

The decree also addressed the subject matter of federal funding for certain improvements at the Plant. Paragraph VII of the consent decree addressed the question whether federal funding was available for improvements at the Plant. First, EPA and petitioner agreed that certain items were eligible for federal funding. C.A. App. 52. As to certain other improvements, the parties agreed that the issue would be resolved by an administrative appeal within EPA. *Ibid.* A third category of improvements consisted of "other elements of the program [that] will be eligible for federal funding if they are found to be necessary under the Interim

Corrective Action and Evaluation Program as set forth in Appendix A of this Decree." *Ibid.*

b. Throughout the life of the consent decree, petitioner maintained that the Plant required additional oxy-genation capacity to meet the effluent limitations in its permit.[3] In the Memorandum of Understanding, EPA identified devices to achieve improved oxygenation as not necessary to bring the Plant within applicable effluent limitations. See Pet. App. 6C. In March 1985, EPA informed petitioner that it did not believe that the Plant showed a need for additional oxygenation capacity to meet its permit limits. Pet. App. 7C-8C.

Petitioner claimed in response that it needed additional oxygenation capacity consisting of both a cryogenic generator and an additional UNOX reactor, and submitted a report to that effect by its consulting engineers. Pet. App. 8C. After further consideration, EPA agreed that a cryogenic system was necessary but again expressed doubt as to the need for a UNOX reactor. In August 1985, EPA informed petitioner that "there is considerable doubt as to the real necessity of such a costly item as an additional UNOX reactor. It is EPA's contention [that] final [Plant] limits may be met with funded items and cryogenic system." C.A. App. 300.

On November 22, 1988, EPA approved petitioner's final plan and schedule, "in accordance with EPA comments."[4] C.A. App. 132. At that time, the Plant was

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[3] Several devices can be used to increase the oxygen contained in effluent. In this case, petitioner originally proposed to use a device called a "UNOX reactor." Petitioner now proposes to add a "bioroughing tower." For present purposes, the differences between those two devices are immaterial. The devices are sometimes referred to in the record as "Battery D."

[4] The court of appeals mistakenly stated that EPA approved the final plan and schedule in 1985 rather than 1988. Pet. App. 6D. Contrary to petitioner's unsupported assertion (Pet. 11), however,

"providing wastewater treatment in accordance with the limits of the NPDES permit" without the additional UNOX reactor. C.A. App. 132.[5]

After EPA approved the final plan and schedule, petitioner requested EPA to reevaluate the need for additional oxygenation capacity at the Plant. Pet. App. 7D. Petitioner sought to justify the proposed improvements based on "additional sludge flows that were not included or anticipated in the development of the Final Plan." Pet. App. 8D-9D. Moreover, petitioner had expanded the number of customers served by the Plant. Pet. App. 9D. EPA authorized the Commonwealth of Kentucky to review the asserted need, see 33 U.S.C. 1296, and the Commonwealth concluded that the proposed improvements complied with applicable state and federal regulations. *Ibid.*

3. On July 17, 1990, the United States moved to terminate the consent decree based on petitioner's compliance with the NPDES permit since 1986. Pet. App. 11C. Petitioner opposed termination of the decree. Although it admitted that it had achieved compliance with the applicable effluent limitations of the NPDES permit, petitioner claimed that the purposes of the consent decree had not been met because the Plant still lacked the additional UNOX reactor. Petitioner contended that the consent decree exempted it from compliance with the Clean Water Act until sufficient improvements were made to allow the Plant to operate at its capacity of 105 million gallons per day in compliance

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the court of appeals did not "erroneously state[] that approval came *after* the EPA sought to terminate the Consent Decree."

[5] Although EPA received the proposed final plan and schedule in 1983 and conditionally accepted it, it could not approve the plan because of delays in developing certain other aspects of the Plant's management plan. C.A. App. 132.

with the effluent limits contained in its permit. Petitioner contended that the Plant could operate at 105 million gallons per day and still remain within the terms of the permit only if the additional UNOX reactor were built. Petitioner moved to amend the consent decree to provide a set termination date in 1994, when the final improvements to the Plant would be completed. C.A. App. 363.

The district court granted EPA's motion to terminate the decree. Pet. App. A1-A2. Petitioner moved for reconsideration, and the district court reaffirmed its earlier decision terminating the decree. Finding that the purpose of the consent decree was to "bring about compliance with 'applicable effluent limitations,'" Pet. App. 14C, the district court concluded that petitioner had complied with those limitations when EPA approved the final plan and schedule in November 1988, and that it continued to remain in compliance with those limitations until 1990. Pet. App. 15C. The court also reviewed the dispute regarding the necessity of the additional UNOX reactor, and concluded that the increased oxygenation capacity that EPA and the Commonwealth agreed was warranted was the result of additional sludge flows that were not anticipated in the original decree and were not part of the decree's terms. Accordingly, the need for increased oxygenation facilities at the Plant's current operating levels did not justify extending the consent decree. Pet. App. 7C-11C.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. D1-D26. Relying on the "four corners" of the consent decree, Pet. App. 17D-18D, the court concluded that the purpose of the consent decree was "to correct the problems so that the then current effluents met the permit limits." Pet. App. 20D. The court rejected petitioner's argument that the decree contemplated compliance with effluent limitations while the

Plant was operating at its current full capacity of 105 million gallons of sewage per day, finding nothing in the decree to support that notion. Pet. App. 18D. "The 1978 consent decree's purpose was not to correct the design problems of the [Plant] for future increase [*sic*] sewage flow, but to correct the problems so that the then current effluents met the permit limits." Pet. App. 20D.

The court also rejected petitioner's contention that the decree should be extended until 1994 to permit the completion of the construction of increased oxygenation capacity. "Considering the public's interest in compliance with the Clean Water Act, we are not prepared to say that a plant that was able to comply with its required effluent limitations for several years should now be allowed to again violate its permit with impunity while constructing new equipment." Pet. App. 22D.[6]

ARGUMENT

The single issue presented in this case is whether the courts below erred in concluding that the purposes of the consent decree at issue were met when the Plant operated within permit limits for several years, and that the decree accordingly should be terminated. That fact-bound conclusion of both the district court and the court of appeals turns on the interpretation of a particular consent decree. Moreover, the decision below is correct, and does not conflict with any decision from this Court or another court of appeals. Accordingly, further review is not warranted.

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[6] Chief Judge Merritt dissented. Contending that "[t]he 'effluent limitations' were met for only a short period at very low levels of discharge," Pet. App. 23D, he argued that petitioner could not now meet its limits, and accepted petitioner's representations that its new construction would bring it into compliance in 1994. *Ibid.*

1. Petitioner contends that the decree contemplated achievement of the permit's effluent limitations at the Plant's maximum design capacity of 105 million gallons of sewage per day. As the courts below concluded, however, that contention is incorrect.

As a general rule, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971). The purpose of the consent decree in this case was to bring the Plant into compliance with the terms of petitioner's NPDES permit. Both parties agreed that petitioner "ha[d] not attained the effluent limitations contained in" its permit, C.A. App. 50, and entered into the decree to enable petitioner to make necessary changes at the Plant to bring it into compliance.[7] While that process was underway, EPA agreed to refrain from seeking penalties for "violation of applicable effluent limitations." C.A. App. 54.[8]

The decree established a "phased approach" to determine the steps necessary to remedy the Plant's "failure to achieve NPDES discharge requirements." C.A. App. 56. Under that approach, the Interim Corrective Action Program was intended "to ascertain if limited improvements can bring about compliance with effluent

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[7] The terms of the permit establish effluent limitations without regard to the amount of sewage processed by the Plant. See C.A. App. 16-26.

[8] Paragraph V(A) of the consent decree required petitioner to "comply with all conditions and requirements" of its permit, with certain exceptions (primarily the permit's effluent limitations). The decree also maintained the permit's requirement that petitioner "operate the plant as efficiently as possible." *Ibid.* Contrary to petitioner's assertions (Pet. 18-19), the decree thus contemplated enforcement actions if petitioner failed to comply with certain terms of the permit.

limitations." *Ibid.* Petitioner would then conduct an Evaluation Program "to consider what further steps may be necessary to achieve compliance." *Ibid.* "If the actions identified * * * in the Interim Corrective Action and Evaluation Program fail to demonstrate that the [Plant] can achieve compliance with applicable effluent limitations," only then did the decree contemplate that petitioner would conduct a cost effectiveness evaluation of major modifications to the Plant, including adding additional oxygenation capacity. C.A. App. 61.

As the four corners of the consent decree thus indicate, its limited purpose was to achieve effluent levels consistent with the Plant's permit. The decree did not address the operating levels at which those limits must be met, and there is no indication in the decree or elsewhere that the parties contemplated that petitioner would be free to violate the permit with impunity until the Plant was able to meet the permit limits at its full capacity of 105 million gallons of sewage per day. As the court of appeals noted (Pet. App. 8D-9D), the volume of discharges at the Plant has increased in recent years, and there is no indication that the Plant was operating, or was expected to operate, at 105 million gallons per day when the permit was issued in 1977, or when the consent decree was entered in 1981.

As both courts below concluded, under the clear terms of the decree, its purpose "was not to correct the design problems of [the Plant] for future increase [*sic*] sewage flow, but to correct the problems so that the then current effluents met the permit limits." Pet. App. 20D. See also Pet. App. 12C (consent decree's purpose "was to bring [the Plant] into compliance with the law"). Because it is undisputed that the Plant complied with the permit conditions for more than three years, see Pet. App. 15C, 7D, the district court was correct to conclude

that the purposes of the consent decree had been met and that it accordingly should be terminated.[9]

2. The policies of the Clean Water Act and the public interest also support the lower courts' interpretation of the consent decree. As the Ninth Circuit has held, if a consent decree has "a 'purpose' to be effectuated, it is the purpose of the statute pursuant to which the government seeks relief. Within that framework, the parties strike their bargain." *United States* v. *Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 650 (9th Cir. 1981). The statutory scheme does not focus on the volume of discharges from a point source. Instead, the Clean Water Act establishes a system of periodically issuing permits of limited duration that set effluent limits for a particular point source. Those permits may not last for more than five years, 33 U.S.C. 1342(b)(1)(B), and, as a general rule, each successive permit for a point source may be no less stringent than the one it succeeds. 33 U.S.C. 1342(*o*)(1).

Petitioner's interpretation of the consent decree is inconsistent with that statutory scheme. Petitioner contends (Pet. 21) that the consent decree could terminate only when it got "what it had contracted for: a treatment plant that would treat 105 [million gallons per day] of effluent within * * * permit limits." *Ibid.* In petitioner's view, the consent decree effectively extended the term of its permit to three times its permissible

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[9] Petitioner relies (Pet. 22) on Chief Judge Merritt's "well-reasoned dissent." That dissent was based, however, on the erroneous premise that the effluent limitations "were met for only a short period at very low levels of discharge." Pet. App. 23D. Petitioner agrees (Pet. 21) that the Plant met its permit limitations for three years. See also Pet. App. 7D. And there is nothing to indicate that the Plant operated during that period at low levels of discharge. In fiscal year 1988-1989, for example, the Plant operated at 98 million gallons per day, or about 94% of its capacity. C.A. App. 316.

length, and at the same levels of effluent limitations established more than fifteen years ago. And it also exempted petitioner from complying with the terms of the permit during that period.

In fact, however, the consent decree had a more limited purpose. As the courts below concluded, it was intended simply to bring the Plant into compliance with its permit. Once the Plant achieved compliance with the permit, the decree's purposes were met and it was subject to termination. If that were not so, the public interest in enforcing the Clean Water Act would be thwarted. See *Heath* v. *De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989). Under petitioner's interpretation, the consent decree immunized petitioner from complying with the terms of the Clean Water Act until it is able to build a plant that can meet all of its anticipated needs. Petitioner contends, moreover, that it is free during that indefinite period to continue to discharge sewage into public waters at levels in excess of its fifteen-year-old permit limits without any fear of enforcement of the Clean Water Act. In these circumstances, the court of appeals was correct to conclude that petitioner's interpretation of the consent decree is "untenable." Pet. App. 16D.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

J. CAROL WILLIAMS
PETER A. APPEL
Attorneys

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